No. 90-1497

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stephen A. Weaver
1020 N. San Vicente Boulevard
West Hollywood, California 90069
Tel. (213) 854-6171

Attorney for Petitioners

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stephen A. Weaver
1020 N. San Vicente Boulevard
West Hollywood, California 90069
Tel. (213) 854-6171

Attorney for Petitioners

ISSUES PRESENTED FOR REVIEW

1. Can the National Labor Relations Board ("Board") single out this case and order back pay for illegal aliens in violation of its own written policies and this Court's decision in Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984), and create a fundamental conflict with the Immigration Reform and Control Act of 1986?

2. Did the Court of Appeals for the Ninth Circuit err when it (a) narrowly construed Sure-Tan and held illegal aliens are entitled to back pay if they remain within the United States (Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro), 795 F.2d 705 (9th Circuit 1986) and (b) admonished the Board in dictum that Felbro controlled here (NLRB v. Ashkenazy Property Management Corporation (Ashkenazy II), 817 F.2d 74 (9th Cir. 1987))?

3. Did the Court of Appeals for the District of Columbia err in concluding the Ninth Circuit's decision in Ashkenazy II established the law of the case that illegal aliens are

entitled to back pay even though the Ninth Circuit in Ashkenazy II denied the Union's motion to prohibit inquiry into the legal status of workers, but in dictum stated the Board should follow Felbro?

TABLE OF CONTENTS

PAGE NO.

ISSUES PRESENTED FOR REVIEW..... i

TABLE OF AUTHORITIES..... ii

OPINIONS BELOW..... 2

JURISDICTION..... 2

PERTINENT STATUTES..... 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT.....10

ARGUMENT.....11

I. THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN SURE-TAN REQUIRES THIS COURT TO OVERTURN THE BOARD'S DECISION BELOW..... 11

A. The Board's Failure to Follow Sure-Tan is an Egregious Error..... 11

B. The Board's Selective Application of Felbro to Petitioners Must Be Set Aside..... 13

C. The Felbro Decision is Wrong and Should Have Not Been Followed..... 15

1. Felbro was Wrong and Misread the Supreme Court's Holding in Sure-Tan.....16

2. The Passage of the IRCA

Eviscerates Felbro..17

3. Felbro is Factually Distinguishable from the Instant Case....20

D. The D.C. Circuit Erred when It Held the Ninth Circuit's Decision in Ashkenazy II Created Law of the Case..22

CONCLUSION.....25

APPENDIX 27

TABLE OF AUTHORITIES

C A S E S

PAGE NO.

Basic Media, Ltd. v. FCC,
559 F.2d 830 (D.C. Cir. 1977)..... 15

L'Ermitage Hotel, 268 NLRB 744 (1984) 5

Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro),
795 F.2d 705 (9th Cir. 1986)..... 5-7, 10-14, 16-26

Local 777, Democratic Union Organizing Committee v. NLRB,
603 F.2d 862 (D.C. Cir 1978)..... 14

Melong v. Micronesian Claims Commission,
643 F.2d 10 (D.C. Cir. 1980)..... 24

NLRB v. Ashkenazy Property Management Corp.,
796 F.2d 479 (9th Cir. 1986)..... 5

NLRB v. Ashkenazy Property Management Corp.
817 F.2d 74 (9th Cir. 1987)..... 2,6 9,23 25

Oil, Chemical & Atomic Workers International Union v. NLRB,
806 F.2d 269 (D.C. Cir. 1986)..... 14

Steger v. Defense Investigative Service Dept. of Defense,
717 F.2d 1402 (D.C. Cir. 1983)..... 14

Sure-Tan, Inc. v. NLRB,
467 U.S. 883 (1984)..... 5,10-13,16,17, 20-22,24

Teamsters Local Union 769 v. NLRB,
532 F.2d 1385 (D.C. Cir. 1976).....13

White v. Murtha,
377 F.2d 428 (5th Cir. 1967)..... 24

S T A T U T E S

Immigration Reform and Control Act of 1986
8 U.S.C. Section 1324A, et seq. 10

National Labor Relations Act, 29 U.S.C.
Section 151, et seq. 3

ADMINISTRATIVE AUTHORITY

NLRB Case Handling Manual 12

Memorandum OM 85-57, June 26, 1985, "Ashkenazy Property Management Corp., d/b/a/ L'Ermitage Hotel, Case 31-CA-10775," reprinted in 120 Lab. Rel. Rep. (BNA) 342 (1985) 5

Memorandum GC 87-8, October 27, 1987 "The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminatees," reprinted in Daily Lab. Rep. (BNA), No. 219, at C-3 (Nov. 16, 1987) 6,19

Memorandum GC 88-9, September 1, 1988 "Reinstatement and Back Pay Remedies for Discriminatees Who Are 'Undocumented Aliens,'" reprinted in Daily Lab. Rep. (BNA), No. 187 at C-6 (Sep. 27, 1988) 7,8 19

T R E A T I S E S

Fjelstad, "Comment: The National Labor Relations Act and Undocumented Workers: Local 512 v. NLRB after the Immigration Reform and Control Act of 1986," 62 Wash. L. Rev. 595 (1987) 18

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ashkenazy Property Management Corporation, d/b/a L'Ermitage Hotel; Ashkenzay Enterprises, Inc.; Ashkenazy Development Corporation; 9829 Burton Company, d/b/a L'Ermitage Hotel petition for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the District of Columbia, entered October 30, 1990.

BEST AVAILABLE COPY

OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 30, 1990 ("Judgment") was not published. The Judgment affirmed the Supplemewntal Decision and Order of the National Labor Relations Board ("SDO"), dated April 28, 1990, 293 NLRB No. 114. The SDO relied in part on NLRB v. Ashkenazy Property Managment Corporation, 817 F.2d 74 (9th Cir. 1987) ("Ashkenazy II"). These decisions are set forth in Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 30, 1990. Jurisdiction of the D.C.Circuit was pursuant to 29 United States Code Section 160(f). Petitioners filed an Application for Extension of Time in Which to File Petition for Writ of Certiorari on January 18, 1991. On

January 22, 1991, this Court entered its order extending time in which to file a petition for writ of certiorari to and including February 28, 1991.

The jurisdiction of this Court is invoked pursuant to 28 United States Code Section 1254(1).

PERTINENT STATUTES

The pertinent statutes are the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, et seq (1976) (the "NLRA" or the "Act"), and the Immigration Reform and Control Act of 1986, 8 U.S.C. Sections 1324A, et seq., (the "IRCA"). Pertinent sections of these acts are set forth in Appendix A.

STATEMENT OF THE CASE

Petitioners own and operate L'Ermitage Hotel in Beverly Hills, California. This dispute arose

when many members of the housekeeping staff ("Discriminatees") refused to work and consequently were terminated. The Board concluded the Discriminatees' conduct was protected under the NLRA and issued its Original Decision and Order on February 1, 1984 and a Supplemental Order on June 6, 1984 (together "Original Order") directing Ashkenazy Property Management Corporation, dba L'Ermitage Hotel; ("APMC")[1/] to reinstate and pay Discriminatees

---

1/ Alhough the Board's Original Order was only against APMC, the General Counsel named Ashkenazy Enterprises, Inc., Ashkenazy Development Corporation and 9289 Burton Company dba L'Ermitage Hotel in the Back Pay Specification. Subsequently, Petitioners admitted that they were "joint employers" under the National Labor Relations Act. However, that admissin did not waive and has not waived Petitiones' rights to claim that except for APMC, they are not subject to the Original Order as enforced.

for their loss of earnings. L'Ermitage Hotel, 268 NLRB 744 (1984). The United States Court of Appeals for the Ninth Circuit enforced the Original Order in a decision without a published opinion. NLRB v. Ashkenazy Property Management Corp., 796 F.2d 479 (9th Cir. 1986) ("Ashkenazy I").

Concerning the compliance proceedings, the Board's General Counsel, based upon this Court's decision in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (holding illegal undocumented workers are not entitled to back pay), instructed the Board's Regional Office 31 to determine the Discriminatees' immigration status. Memorandum OM 85-57, June 26, 1985, "Ashkenazy Property Management Corporation dba L'Ermitage Hotel, Case 31-CA-10775", reprinted in 120 Lab. Rel. Rep. (BNA) 342. The Hotel and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO ("Union") objected to the General Counsel's instruction and filed a motion with the United States Court of Appeal for the Ninth Circuit, citing Local 512, Warehouse & Office Workers' Union v. NLRB

(Felbro), 795 F.2d 705 (9th Cir. 1986) (holding illegal undocumented workers who are physically present in the United States are entitled to back pay). In response to the Union's motion, the Board, without explanation, reversed its prior position and acquiesced to the Felbro decision. However, the Board limited its acquiescence to Felbro to only this case (Response of the Board to Charging Party's Motion to Compel Compliance with Panel Opinion, at 2). The Ninth Circuit denied the Union's motion, but then admonished the Board for not originally following its decision in Felbro. NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987) ("Ashkenazy II").

Before the compliance proceedings, the Board's General Counsel formally announced the Board's position that undocumented aliens are not entitled to back pay or reinstatement. Memorandum GC 87-8, October 27, 1987 "The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented

Discriminatees", reprinted in Daily Lab. Rep. (BNA), No. 219, at C-3 (Nov. 16, 1987). The compliance hearing (the "Hearing") was conducted before Administrative Law Judge Gerald A. Waxknov (the "ALJ") who granted the Union's petition to revoke Petitioners' subpoenas seeking information about the immigration status of the Discriminatees (Tr. 42-95) and excluded all testimony relating to the Discriminatees' immigration status declaring that he was bound by the Board's acquiescence to Felbro (Tr. 32-33).

Before the ALJ's Supplemental Decision, the Board's General Counsel again reiterated the Board's position that illegal aliens are ineligible for reinstatement and back pay. Memorandum GC 88-9, September 1, 1988 "Reinstatement and Back Pay Remedies for Discrimination Who Are 'Undocumented Aliens'", reprinted in Daily Lab. Rep. (BNA), No. 187 at C-6 (Sep. 27, 1988). In Memorandum GC 88-9, the General Counsel stated: "[T]he Board has conditioned reinstatement and back pay remedies

of discriminatees upon their being lawfully entitled to be present and employed in the United States." In that Memorandum, the General Counsel also stated that the Board had not acquiesced in the Felbro holding.[2/]

Without mention of the Board's announced position against Felbro, the ALJ excluded all evidence relating to the Discriminatees' immigration status, including any evidence on departures from and reentry to the United States, and awarded $58,359.64 in total net back pay to seven Discriminatees and directed Petitioners to deposit maximum back pay awards (an additional $18,335.79) in escrow for one year pending efforts to locate nine Discriminatees whose whereabouts were unknown.

[2/] Further in Memorandum GC 88-9, the General Counsel cited Felbro and then explicitly stated "the Board has not acquiesced to the view of the Ninth Circuit ..." Id. at fn. 2.

The Board entered its Supplemental Decision and Order on April 28, 1989, adopting the ALJ's Supplemental Decision and upholding the back pay awards without explaining why it had deviated from the Board's otherwise clear policy against Felbro.[3/]

[3/] ALJ's Supplemental Decision is abbreviated as "S.D."; Transcript of the Hearings as "Tr."; General Counsel's Exhibits NLRB 1071 (1986), as amended, 284 NLRB as "G.C. Exh."; and Petitioners' Exhibit as "P. Exh." Copies of the above are in the record of the D.C. Circuit. Petitioners timely filed their Petition for Review with the United States Court of Appeals for the District of Columbia Circuit on June 20, 1989. The D.C. Circuit affirmed the Board's decision on the grounds that the Ninth Circuit's decision in Ashkenazy II, which denied the Union's motion to prohibit inquiry into the legal status of workers, nevertheless was the law of the case establishing illegal aliens are entitled to back pay.

SUMMARY OF ARGUMENT

This Court in Sure-Tan held unequivocally that employees must be legally entitled to be present and employed in the United States to qualify for back pay and reinstatement remedies. The Sure-Tan holding was cemented by Congress' passage of the Immigration Reform and Control Act of 1986, 8 U.S.C. Section 1324A, et seq. ("IRCA"). The Board, however, in response to the narrow interpretation of Sur-Tan by the Ninth Circuit in Felbro, refused to permit any inquiry into the legal status of the Discriminatees. The Board's action directly contradicts the Board's own announced policies that undocumented workers are ineligible for back pay. Petitioners submit that Felbro misconstrued this Court's decision in Sure-Tan. The dubious merit of Felbro is evidenced by the Board's refusal to follow it in other cases. Also, any theoretical support for Felbro was expunged by the passage of the IRCA.

ARGUMENT

I. THE DECISION IN SURE-TAN REQUIRES THIS COURT TO OVERTURN THE BOARD'S DECISION BELOW.

A. The Board's Failure to Follow Sure-Tan is an Egregious Error.

In Sure-Tan, Inc.v. NLRB, 467 U.S. 883 (1984), this Court held that remedies for violations of the NLRA must not ignore the requirements of the Immigration and Nationality Act ("INA"). As a result, the Court held that illegal aliens are ineligible for the remedies of reinstatement and back pay in a compliance proceeding under the NLRA.

This Court expressly held that a discharged employee would not be entitled to any remedy under the NLRA for any period when he or she was not lawfully entitled to be present and employed in the United States:

[T]he implementation of the Board's

traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another 'equally important congressional objective[s]', [citation omitted] -- to wit, the objective of deterring unauthorized immigration that is embodied in the INA. By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing back pay, the employees must be deemed 'unavailable' for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. Cf. NLRB Case Handling Manual Sections 10612, 10656.9 (1977). [Emphasis added]

Sure-Tan, 467 U.S. at 902-903.

Thus, this Court's decision in Sure-Tan not only validates the denial of reinstatement and back pay remedies to workers who are not lawfully entitled to be present and employed in the United States, it requires that the Board implement and follow such a policy.

B. The Board's Selective Application of Felbro to Petitioners Must be Set Aside.

It is a well-established principle that similar situations must be treated similarly. This Court has explained:

> [T]he Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them. Thus, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."
>
> [Footnote omitted]

Teamsters Local Union 769 v. NLRB, 532 F.2d 1385, 1392 (D.C. Cir. 1976).

In order to depart from precedent or announced practices, an agency must consider and explain both the contrary rules and the reasons for the departure. Steger v. Defense Investigative Service Dept. of Defense, 717 F.2d 1402, 1406 (D.D. Cir. 1983). Even if the contrary rule is considered and rejected, the Board must explain its departure from a well established principle. Oil, Chemical & Atomic Workers International Union v. NLRB, 806 F.2d 269, 273 (D.C. Cir. 1986); Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862, 872 (D.C. Cir 1978).

Here, the Board's acquiescence to the Felbro decision only in this case was made without explanation. When its one time unexplained acquiescence is coupled with its prior and subsequent declarations that it is not bound by and will not follow Felbro, the Board has obviously violated its duty to distinguish, follow or overrule precedent. This kind of selective enforcement smacks of the very worst

sort of agency practice. See Basic Media, Ltd. v. FCC, 559 F.2d 830, 833 fn. 2 (D.C. Cir. 1977) quoting Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964) (concurring opinion) (the "'law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright for a specific case.'").

The Board's actions here impose on Petitioners' back pay awards which the Board itself recognizes to be in direct contradiction to a decision of this Court and admits it will not impose in other cases. The Board's imposition of these extraordinary awards without stating any reasons to justify its action is an abuse of the Board's discretion.

C. The Felbro Decision is Wrong and Should Have Not Been Followed.

The Felbro decision is clearly wrong, bad law, and should not have been followed by the Board. The majority of the three member panel attempted to construe narrowly this Court's decision in Sure-Tan over a strong dissent. Additionally, the logical and legal underpinnings, if any, of Felbro were removed a few months after it was decided by the passage of the IRCA.

1. Felbro Was Wrong and Misread this Court's Holding in Sure-Tan.

The Ninth Circuit's decision in Felbro completely ignored the Supreme Court's holding in Sure-Tan that a worker who was "not lawfully entitled to be present and employed in the United States" "must be deemed 'unavailable' for work" and therefore is not eligible for back pay. Sure-Tan, 467 U.S. at 903. The majority in Felbro attempted to harmonize its decision with Sure-Tan by ignoring the "to be present and employed" language and stressing the illegal

aliens in Sure-Tan had left the United States whereas the workers in Felbro had remained in the United States. The majority's distinction was immaterial. Sure-Tan holds that back pay may not be awarded to a worker "not lawfully entitled to be present and employed in the United States". Thus, a worker must satisfy two criteria: lawful presence and lawfully entitled to be employed. The Felbro majority also ignored the requirement in Sure-Tan that the NLRA must be construed in harmony with, and not independent of, the immigration laws of the United States. The Board's refusal to follow Felbro in all other cases reveals just how wrong Felbro is and just how wrong the Board itself views Felbro to be.

2. The Passage of the IRCA Eviscerates Felbro.

Even if correct when decided, the passage of the IRCA has completely undermined the Felbro decision. See Fjelstad, "Comment: The National Labor Relations Act and Undocumented

Workers: Local 512 v. NLRB after the Immigration Reform and Control Act of 1986", 62 Wash. L. Rev. 595, 603 (1987). Shortly after Felbro, Congress passed the IRCA. The IRCA makes the employment of undocumented aliens, even those already in the United States, unlawful. 8 U.S.C. Section 1324A(a). The IRCA imposes civil penalties on employers who knowingly hire undocumented aliens and imposes criminal penalties on employers who demonstrate a pattern of knowingly hiring undocumented aliens. 8 U.S.C. Sections 1324A(e) and (f). Thus, the specific conduct approved of and ordered in Felbro is now a civil and criminal violation of federal law.

The IRCA eviscerated the theoretical underpinnings of Felbro. The Felbro court declared that because it was not "unlawful for an employer to hire" an illegal alien remaining in the United States, ordering back pay and reinstatement "would not impinge" on the immigration laws. Felbro, 795 F.2d at 719-720. The IRCA removes this linchpin of the Ninth

Circuit's analysis by making an award of back pay and reinstatement to an illegal alien a violation of the immigration laws. Following the enactment of the IRCA, the only way to harmonize the provisions of the NLRA and the immigration laws, as required by Sure-Tan, was outlined by the Board and its General Counsel in the memoranda: the status of the discriminatee as an undocumented worker prohibits the remedies of back pay and reinstatement for that worker. Memorandum GC 87-8; Memorandum GC 88-9. However, this analysis was rejected without explanation by the Board in this case.

Further, following the enactment of the IRCA, the issue which so concerned the Court in Felbro, the incentive for employers to hire illegal aliens because they would not be eligible for back pay claims (see Felbro, 795 F.2d at 719), has been eliminated by the IRCA's civil and criminal sanctions for employing such workers.

Accordingly, if the Felbro decision had any

theoretical support, the enactment of the IRCA eliminated it. Hence, the Board erred when it followed Felbro in this case and refused to allow inquiry into the immigration status of the Discriminatees.

3. Felbro is Factually Distinguishable from the Instant Case.

Finally, even if Felbro is good law, it is factually distinguishable. In Felbro, the discriminatees were almost immediately reinstated by the employer. Felbro, 795 F.2d at 709. The Ninth Circuit emphasized this fact to distinguish Felbro from Sure-Tan. Felbro, 795 F.2d at 717. By contrast, here many of the Discriminatees were never reemployed by the Petitioners. Also, in Felbro the discriminatees there had remained in the United States and therefore had not violated the immigration laws, a distinction crucial to the Ninth Circuit's distinguishing Sure-Tan. Id. at 722. Here the ALJ refused to allow questions about the legality of any departures from and reentry into the United States by any of the

Discriminatees (S.D., at 2). Therefore, unlike in Felbro, it is unknown whether any of the Discriminatees departed and then illegally entered the United States during the back pay period.

The ALJ also struck testimony of illegal status and ignored evidence of probable illegal status. At least one of the Discriminatees testified at the Hearing that one of the main reasons why she was unable to locate employment during the back pay period was because of her status as an illegal alien (Tr. 179-180). The ALJ struck this testimony. Another discriminatee had worked under so many aliases that the General Counsel had to bring in other witnesses to testify as to her true identity (Tr. 303-316). Yet another admitted to being in Mexico for six months, but Petitioners were not allowed to inquire as to the legality of his reentry in the United States (Tr. 193). Had the Hearing been conducted in accordance with the Board's own guidelines and in accordance with the Sure-Tan decision, evidence as to the Discriminatees'

immigration status would have been adduced. Based upon this evidence, the Board would have determined that the back pay awarded to many of the Discriminatees was improper.

D. The D.C. Circuit Erred when It Held the Ninth Circuit's Decision in Ashkenazy Created Law of the Case.

When the Regional Office began to follow Sure-Tan and the General Counsel's mandate by investigating the immigration status of the Discriminatees, the Union objected. The Union filed a motion with the Ninth Circuit seeking to prevent the Region from following Sure-Tan, and to prevent the Board from conducting any investigation into the Discriminatees' immigration status. In response to the Union's motion, the Board reversed course, abandoned the requirements of Sure-Tan, and acquiesced with the opinion in Felbro, but limited its acquiescence "only with respect to the instant case" (Response of the Board to Charging Party's Notion to Compel

Compliance with Panel Opinion, at 2). After the Board's acquiescence to the Felbro decision, the Ninth Circuit denied the Union's motion. Ashkenazy II, 817 F. 2d at 74.

The ALJ and the Board erroneously stated in their opinions that the Ninth Circuit's decision in Ashkenazy II ordered them to follow Felbro (S.D. at 1; S.D.O., at 1). The D.C. Circuit also concluded that Ashkenazy II created law of the case entitling illegal aliens to back pay. The ALJ, Board and D.C. Circuit, however, failed to explain why the Ninth Circuit's discussion of Felbro in Ashkenazy II is anything other than dictum.

In Ashkenazy II, the Ninth Circuit denied the Union's motion: "the charging party's motion to compel compliance ... is denied." 817 F.2d 74. Having denied the motion, the balance of the Ninth Circuit's decision, including its reprimand of the Board, is dictum because it does not address a pending question or the Ninth Circuit's denial of the Union's motion.

Furthermore, the Ninth Circuit's denial of the Union's motion did not compel the Board to follow Felbro. The Board elected to abide by Felbro, not a court decision compelling the Board to follow Felbro; therefore, the law of the case doctrine does not apply, because there was no judicial resolution of the issue in the Ninth Circuit's denial of the Union's motion.

As explained by this Court, the law of the case should be followed on a subsequent appeal in the appellate court, "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." Melong v. Micronesian Claims Commission, 643 F.2d 10, 17 (D.C. Cir. 1980), quoting, White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967). Here the controlling authority is Sure-Tan. Furthermore, the applicable law has been modified by an act of Congress, IRCA. Even if Felbro was correctly

decided, it is distinguishable from the facts here. Furthermore, Ashkenazy II did not establish the law of the case. Accordingly, the D.C. Circuit was not bound by Felbro and Ashkenazy II.

Thus, the Ninth Circuit's decision in Ashkenazy II did not resolve the issues presented here: (a) may the Board selectively disregard without explanation an on point decision of this Court; (b) whether Felbro is still good law; and (c) whether the Board violated Sure-Tan and the IRCA when it refused to allow inquiry into the immigration status of allegedly illegal aliens.

CONCLUSION

As is shown above, the Board's action in selectively following Felbro is this case violates the law. In fact, the Board's refusal to follow Felbro in all other cases is proper and should have happened here. Felbro was a narrow decision over a strong dissent; it was questionable when decided and has now been superseded by the provisions of the IRCA. It is

not good law. The Board's decision below was wrong, and the D.C. Circuit erred in ruling the Ninth Circuit's decision in Ashkenazy II was law of the case. It is imperative that the Court grant this petition and address the important issues presented. If the Board's decision is left to stand, back pay and reinstatement will be ordered for illegal aliens in the Ninth Circuit pursuant to Felbro and contrary to IRCA, but denied in other Circuits.

Dated: February 28, 1991

Respectfully submitted,

Stephen A. Weaver

Stephen A. Weaver
Attorney for Petitioners
ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A/ L'ERMITAGE HOTEL

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-1497

No.

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX A TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX A

STATUTES

Pertinent Sections of the following statutes are reproduced:

National Labor Relations Act, 29 U.S.C. Section 151, et seq.

Immigration Reform and Control Act of 1986, 8 U.S.C. Section 1324A, et seq.

DECISIONS

Judgement of the Court of Appeals for the District of Columbia Circuit, entered October 30, 1991.

Supplemental Decision and Order of the National Labor Relations Board, dated April 28, 1990, 293 NLRB No. 114

Order of the Court of Appeals for the Ninth Circuit, NLRB v. APMC, 817 F.2d 74 (9th Cir. 1987)

STATUTES

NATIONAL LABOR RELATIONS ACT

29 U.S.C. Section 157, provides, in pertinent part, as follows:

Employess shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...

29 U.S.C. Section 158(a)(1) provides, in pertinent part, as follows:

(a) It shall be an unfair labor practice for an employer -

(1) to interefere with, restrain, or coerce employess in the exercise of the rights guaranteed in section 157 of this title.

29 U.S.C. Section 160(c) provides, in pertinent part, as follows:

...If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has

engaged in or is engaging in any unfair labor practice, then the Board shall stateitsfindings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affrimative action including reinstatement of employees with or without back pay...

IMMIGRATION REFORM AND CONTROL ACT

8 U.S.C. 1324A PROVIDES, IN PERTINENT PART, AS FOLLOWS:

(A) Making employment of unauthorized aliens unlawful

(1) In general

It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States -

(A) an alien knowing the alien is an unauthorized alien...with respect to such employment, or

(B) an individual without complying with the requirements of subsection (b) of thes sectiuon.

(2) Continuing employment

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(e) Compliance

....

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations.

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection--

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred.

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a

person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity--

(i) to comply with the requirements of subsection (b) (or subsection (d) of this section if applicable) with respect to individuals hired (or recruited or referred from employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate.

In applying this subsection in the case of a person or entity composed of distinct, physically separate subdivisions each of which provides separately for the hiring, recruiting, or referring for employment, without reference to the practices of, and not under the control of or common control with, another subdivision, each such subdivision shall be considered a separate person or entity.

(f) Criminal penalties and injunctions for

pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 89-1391 SEPTEMBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondents

THE HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 11, AFL-CIO

Intervenor

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE: Edwards, D. H. Ginsburg and Sentelle, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board, and was briefed and argued by counsel. The court has determined that the issues presented occasion no need for a published

opinion. See: D.C. Cir. Rule 14 (c). For the reasons set forth in the accompanying memorandum, it is

ORDERED and ADJUDGED by the court that the petition for review of the National Labor Relations Board's decision of April 28, 1989 be affirmed.

It is FURTHER ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15.

Per Curiam

For the Court

Constance L. Dupre

Clerk

MEMORANDUM

The National Labor Relations Board ("the Board" or "NLRB") found that Ashkenazy Property Management Corporation ("Ashkenazy") committed an unfair labor practice by discharging employees who were engaged in protected concerted activities ("discriminatees"). The Regional Director initially ordered proceedings to implement back pay remedies, but required discriminatees to prove their lawful presence within the country as a condition of receiving back pay.

The Hotel and Restaurant Employees and Bartenders Union, Local 11, challenged this order in the Ninth Circuit, arguing that the Regional Director's order was inconsistent with the Ninth Circuit's decision in Local 512, Warehouse & Office Workers' Union v. NLRB, 795 F.2d 705 (9th Cir. 1986) ("Felbro"). In that case, the Ninth Circuit held that NLRB remedies are to be implemented regardless of a discriminatee's undocumented status. In response, the General Counsel for the NLRB advised the court that all

further back pay proceedings would be held in compliance with the Felbro decision. Accordingly, the Ninth Circuit denied the Union's motion to compel compliance. NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987).

The Board then held back pay proceedings in compliance with Felbro, awarded back pay to seven named discriminatees and ordering Ashkenazy to pay a lump sum into escrow for the benefit of nine unavailable discriminatees. Ashkenazy now appeals the Board's order to this Court.

I.

Ashkenazy first challenges the Board's decision to hold its back pay hearings in compliance with the Ninth Circuit's Felbro decision. However, we find that this issue was already decided by the Ninth Circuit in NLRB v. Ashkenazy Property Management Corp., 817 F.2d 74 (9th Cir. 1987), and thus will be followed by this Court as the law of the case.

Under the law of the case doctrine, a legal decision made at a prior stage of litigation,

unchallenged by subsequent appeal, is binding on subsequent stages of the litigation. See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987). Although this doctrine is a prudential, rather than jurisdictional limitation, See Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990), its application is particularly appropriate where a party brings a previously decided issue before a second forum, in an attempt to "forum shop" for a second opinion. See Indianapolis Power & Light Co. v. NLRB, 898 F.2d 524 (7th Cir. 1990).

Here, the Ninth Circuit previously decided that the Board was required to conduct its back pay hearings in a manner consistent with the Ninth Circuit's Felbro decision. Indeed, the Ninth Circuit specifically stated that "in the case of workers present in the United States, remedies afforded for violations of the National Labor Relations Act, 29 U.S.C. Section 158 (1982), [are] to be implemented regardless of the worker's immigration status." Ashkenazy Property

Management, 817 F.2d at 75.

Under the law of the case, this Court should respect this prior ruling unless t is clearly erroneous or will work a substantial injustice. Melong v. Micronesian Claims Comm'n, 643 F.2d 10, 17 (D.C. Cir. 1980), quoting, White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967). Here, Ashkenazy argues that the Ninth Circuit's decision to apply Felbro in this case is clearly erroneous when examined under the Supreme Court's decision in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

In Sure-Tan, the Supreme Court required NLRB remedies awarded discriminatees who had been voluntarily deported from the country to be conditioned upon the discriminatees' legal reentry into the country. The Ninth Circuit found that Sure-Tan did not address the remedy eligibility of undocumented discriminatees who have remained in the United States and who have not been subject to INS proceedings. Thus, the Ninth Circuit's view is that Sure-Tan is not inconsistent with Felbro's holding that remedies

should be available to discriminatees who remained in the country and were not subject to a final INS determination. See Felbro, 75 F.2d at 77; See also Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A., 860 F.2d 1168 (2d Cir. 1988).

Although this Court need Not adopt a similar interpretation of Sure-Tan, we find that the rationale provided by the Ninth Circuit is not clearly erroneous, nor does it work a substantial injustice. For these reasons, the law of the case applies, and the Board was correct in holding its hearings to copy with the law of the Ninth Circuit.

II.

Ashkenazy also argues that the Board's back pay awards to six of the seven named discriminatees were erroneous because there was not substantial evidence that the discriminatees met their duty to search for interim employment with reasonable diligence. See NLRB v. Madison Courier, Inc., 505 F.2d 391, 395 (D.C. Cir. 1974). The burden of showing that discriminatees

did not meet this duty, however, lies with the employer, rather than with the discriminatees. See, e.g. Sun World, Inc., 282 N.L.R.B. 785 (1987). Here, the Board supported its findings with testimony that all six employees searched diligently for jobs, that all six in fact found interim employment, and that several, at times, were receiving compensation that exceeded their gross back pay levels. As Ashkenazy offered no evidence to rebut this testimony, we find that the Board's findings are supported by substantial evidence on the record as a whole. See St. Agnes Medical Center v. NLRB, 871 F.2d 137, 144 (D.C. Cir. 1989).

Finally, we reject Ashkenazy's contention that the Board erred in ordering the back pay for nine unavailable discriminatees to be placed in escrow. This remedy is appropriate where employer liability exists as to unavailable discriminatees, even though mitigation may yet be shown when a discriminatee makes a claim to the fund. See Starlite Cutting, Inc., 280 N.L.R.B. 1071 (1986), as amended, 284 NLRB 620 (1987); See

also NLRB v. Rice Lake Creamery Co., 365 F.2d 888, 891-92 (D.C. Cir. 1966) (approving escrow remedy for multiple unavailable claimants).

For the preceding reasons, the order of the Board is in all respects

AFFIRMED

SJC

D-9539

293 NLRB No. 114 Los Angeles, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

Case 31--CA--10775

and

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 11, AFL--C10

SUPPLEMENTAL DECISION AND ORDER

On September 21, 1988, Administrative Law Judge Gerald A. Wacknov issued the attached Supplemental Decision in this proceeding. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and

the record in light of the exceptions and briefs and has decided to affirm the judge's ruling[1], findings[2], and conclusions[3] as modified below.

1. With regard to Flores, the back pay specification states that he had no earnings for the first quarter of 1982. During the hearing, Flores testified that he worked as a quality control inspector for the Papermate Company for the first couple of months of 1982. He stated that he was paid $5 per hour and worked 40 hours per week. The Respondent produced a letter of recommendation Flores received from Papermate, dated February 8, 1982. Flores stated that he received that letter 1 or 2 weeks after he had left the company's employ. The letter stated that Flores had worked at Papermate for the last coupe of months. We find that Flores worked the first 5 weeks of 1982 and earned $200 per week. Based on this evidence we will deduct $1,000 from the amount owed to Flores.

2. With regard to Maria Biodrawski, we find that the week she spent in Oregon should not be counted in calculating the back pay owed to her. Biodrawski testified that she accompanied

her father to Oregon because he had a court date there. The trip was made in order to conduct Biodrawski's father's business; it did not involve any business-related matters involving Biodrawski directly. She did not search for work during that week. Nor was she available for work during that period. Thus, 1 week's pay $150.35) should be deducted from the back pay due her.

3. The Respondent in its exceptions to the judge's decision argues that NLRB v. Mercy Peninsula Ambulance Service 589 F.2d 1014 (9th Cir. 1979), compels a finding that Flores, Biodrawski, Cayetano, Chavez, and Alvarenga failed to make reasonable and diligent searches for work. We disagree and find the searches for employment in this case to be clearly distinguishable from the search made by the discriminatee in Mercy.

In Mercy the Board reversed the administrative law judge's finding that the discriminatee was not entitled to back pay for the period from his discharge until November 1974 due to his failure to make a reasonable and diligent effort to search for work. On appeal

the Ninth Circuit reversed the Board, ruling that the discriminatee willfully incurred the loss. The discriminatee during June 1974 made only two phone calls. In July he made only three contacts. In August he made only three contacts in the span of 2 days. In September, again he made only three contacts which engaged approximately 1-1/2 hours of his time. This was typical of the discriminatee's job search for the period of June to November 1974. That scenario does not describe the search made by the discriminatees involved here.

In finding that the discriminatees made sufficient searches for work, the judge noted that the individual discriminatees contacted numerous potential employers through various means. Specifically, the judge found that Flores sought and obtained work during 12 of the 13 quarters for which he was entitled to backpay and credited Flores' testimony that he sought work on a regular basis. Based on Biodrawski's testimony that during the period when she was out of work she looked for work at hotels, hospitals, and restaurants two to three times per week, the

judge found that Biodrawski had made a reasonable search for work. Cayetano's uncontradicted testimony that he sought work two to four times a week at hotels and restaurants and registered with a private employment agency supports the judge's finding that, with the exception of 6 months when he was in Mexico, Cayetano was eligible for backpay for the periods when he was not working. The judge found that Chavez worked steadily throughout the entire backpay period albeit for less money than she earned when she worked for the Respondent. Though the judge found that Alvarenga failed to pursue a reasonably diligent search for work in 1982, the judge credited Alvargena's testimony that subsequent to 1982 he looked for work about three times a week. Based on these findings the situation with regard to each of the above-named discriminatees is obviously distinguishable from the facts in Mercy.

ORDER

The National Labor Relations Board orders the Respondent, Ashkenazy Property Management

Corporation d/b/a L'Ermitage Hotel; Ashkenazy Enterprises, Inc.; Ashkenazy Development Corporation; 9289 Burton Company d/b/a L'Ermitage Hotel, Beverly Hills, California, its officers, agents, successors, and assigns, to make whole the employees named below by paying them the amounts set forth adjacent to their names, plus interest computed in the manner prescribed in New Horizons for the Retarded,[4] accrued to the date of payment, minus tax withholdings required by law:

Francisco Flores	$11,503.99
Maria Guadalupe Biodrawski (nee Lupe Jacobo)	9,042.91
Alberto Cayetano	7,342.55
Irma Chavez (a/k/a Maria Rodriguez)	10,646.57
Maria Villalta	10,031.93
Sonia Moya	1,806.60
Oscar Alvarenga	7,985.09

The total backpay due to the discriminatees listed below shall be paid to the Regional Director for Region 31 and will be held in escrow for 1 year.[5] In the event any or all the below-

named discriminatees appear to collect this backpay, the Respondent will be offered an opportunity by the Regional Director to produce evidence and/or examine such discriminatees about their interim earnings.

Aladino Hammond	$7,733.20
Adela Escallante	898.85
Concepcion Molina	1,939.30
Ana Ramirez	429.70
Gregoria Salazar	4,692.04
Maria Alvarez	1,442.20
Susana Andrade	381.30
Maria Chavez	384.65
Maria Sandoval	434.55

Dated, Washington, D.C. April 28, 1989

James M. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

[1] The General Counsel was required by the United States Court of Appeals for the Ninth Circuit to proceed on a backpay specification consistent with the court of appeals' earlier decision in Garment Workers Local 512 (Felbro) v. NLRB, 795 f.2d 705 (9th Cir. 1986), with respect to backpay entitlement of employees who are undocumented aliens. As the Board did not seek review of the Ninth Circuit's decision, the administrative law judge was clearly bound, and properly rejected the Respondent's arguments that, notwithstanding the Ninth Circuit's decisions, the discriminatees involved in this proceeding should be denied reinstatement and backpay if they are not lawfully entitled to be present and employed in the United States. We note

that, as in Garment Workers Local 512, supra, the discriminatees in this proceeding all were originally hired by the Respondent prior to November 6, 1986, the effective date of the Immigration Reform and Control Act of 1986, Pub. L. 99--603, 8 U.S.C. Section 1001 et seq., as amended.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), anfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We find that the judge incorrectly used the first amended specification in determining Maria Villalta's backpay. Using the second amended specification,

we find that Villalta is entitled to $10,031.93 in backpay.

We also note that the judge in his "Appendix" inadvertently stated the amount due Flores as $12,503.09, rather than $12,503.99.

We agree with the judge that the Respondent's letter of November 20, 1986, to Flores was not a valid offer of reinstatement. We do not, however, rely on 15th Avenue Iron Works, 279 NLRB 643 (1986), in making this finding as the Board there adopted the administrative law judge's decision on that issue in the absence of exceptions.

In its Exceptions Brief, the Respondent requests the Board to take judicial notice of R. Exh. A, pursuant to Federal Rules of Evidence Section 201. This exhibit purportedly sets forth a list of hotels in the Los Angeles area in 1981. The General Counsel objects to this request on the

grounds that the facts regading the list of hotels are not generally known and are not capable of accurate and ready determination by unimpeachable sources as required by the Federal Rules of Evidence. We find merit in the General Counsel's position and deny the Respondent's request. In so doing, we note that the Respondent gives no explanation for its failure to introduce the list at the hearing where it would have been subject to examination by opposing counsel.

3 During the hearing, counsel for the General Counsel introduced G.C. Exh. 12, which showed that discriminatee Cayetano earned $891.78 for the first quarter of 1981. Cayetano worked at the Spires Restaurant during that time and earned $475.53. This amount was taken into account in the computation of his backpay. The remainder, $416.25, was accrued vacation time earned by Cayetano while he was working

for the Respondent. The Respondent claims that this amount should be deducted from the backpay it owes Cayetano. We find no merit in the Respondent's claim. The accrued vacation pay was earned while Cayetano was working for the Respondent before the backpay period began. That the Respondent chose to wait until the backpay period to pay Cayetano does not affect the backpay it owes him.

4 283 NLRB No. 181 (May 28, 1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C Section 6621) shall be computer in accordance with Florida Steel Corp., 231 NLRB 651 (1977).

5 Starlite Cutting, 208 NLRB 1071 (1986)

(Starlite I), as amended, 284 NLRB No. 71 (June 30, 1987) (Starlite II) overruled Duncan Foundry & Machine Works, 222 NLRB 768 (1976), and stated that, in the absence of a discriminatee, a respondent's backpay obligation will lapse at the end of a 1-year escrow period. Absent the discriminatee's showing by a preponderance of the evidence that there were compelling reasons to justify his or her failure to come forward during that period, a respondent shall not remain obligated for the gross backpay amount specified for the discriminatee after the end of the 1-year escrow period. Subsequently, the Board issued an order in Starlite II clarifying the starting date of the 1-year period. In Starlite II the Board majority held that the 1-year escrow period shall begin either when the respondent complies by depositing the backpay into escrow or

on the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. The provisions of Starlite I and II are applicable to the instant case with regard to backpay owed to Aladino Hammond, Adela Escalante, Concepcion Molina, Ana Ramirez, Gregoria Salazar, Maria Alvarez, Susana Andrade, Maria Chavez, and Maria Sandoval. Although Member Johansen dissented in Starlite II, and would find that the 1-year escrow period should begin on the date of issuance of the Board's Order affixing backpay liability, he nevertheless considers himself to be institutionally bound to apply the rule of Starlite II in this case.

Member Cracraft, who did not participate in Starlite I, agrees with former Member Dennis' dissent that backpay for unavailable discriminatees should not lapse after 1-year.

However, so long as Starlite I remains Board law, Member Cracraft will apply the remedy set forth in that decision.

JD(SF)--111--88

Los Angeles, Calif.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

BRANCH OFFICE

SAN FRANCISCO, CALIFORNIA

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, D/B/A L'ERMITAGE HOTEL;
ASHKENAZY ENTERPRISES, INC.;
ASHKENAZY DEVELOPMENT CORPORATION;
9289 BURTON COMPANY, D/B/A L'ERMITAGE HOTEL

and Case 31--CA--10775B

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 11, AFL-CIO

Ann L. Weinman, Atty., and Richard S. Zuniga, Atty., Los Angeles, Calif., for the General Counsel.

Ellen Greenstone, Atty., of Greenstone, Hubel, Holguin & Garfield, Los Angeles, Calif., for the Charging Party.

Benjamin E. Goldman, Atty., and Angie Small, Atty., and Michael Lindsay, Atty., of Graham & James, Los Angeles, Calif., for Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

GERALD A. WACKNOV, Administrative Law Judge: The hearing in this matter was held before me on February 16, 18 and 19, and March 29 and 30, 1988, in Los Angeles, California, based upon a Backpay Specification which issued on October 15, 1987, and was amended on December 9, 1987, alleging that the discriminatees as found by the Board on February 1, 1984 in Ashkenazy Property Management Corporation d/b/a L'Ermitage Hotel, 268 NLRB 744, enfd. on July 28, 1986 by the United States Court of Appeals for the Ninth Circuit (125 LRRM 2615), were entitled to various amounts of backpay as a result of their terminations in contravention of the Act.

The parties were given a full opportunity to introduce evidence, to examine witnesses and to submit post-hearing briefs. Timely briefs were filed by counsel for the General Counsel and counsel for Respondent.

After the opening of the hearing, the parties reached agreement on the backpay owed to 26 of 42 discriminatees. The Respondent has fully complied with the terms of the settlement agreement and, pursuant to the parties' motion, the record is closed with regard to those particular discriminatees.[1]

Further, the General Counsel's motion to delete Maria Vasquez as a discriminatee from the backpay specification, based upon her sworn affidavit of unwillingness to appear for questioning and the small amount of her backpay claim ($401.40), is hereby granted.

The Respondent has contended from the outset of this proceeding, and continues to maintain, that at the time of their discharge

almost all of the discriminatees were illegal aliens and that, pursuant to the United States Supreme Court's decision in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), they are "deemed unavailable" for work (and the accrual of backpay) during any period when they are not lawfully entitled to be present and employed in the United States. In Sure-Tan, the discriminatees had left the United States upon their discharge and did not remain in the United States during the backpay period.

The Court of Appeals for the Ninth Circuit, in Local 512, Warehouse and Office Workers Union v. NLRB (Felbro), 795 F.2d 705, 122 LRRM 3113 (1986), distinguished the facts in Sure-Tan, and held that in the case of discriminatees who remain in the United States, remedies afforded for violations of the National Labor Relations Act are to be implemented regardless of the worker's immigration status. During the initial compliance stage of this proceeding, the Board sought to limit backpay based on its interpretation of Sure-Tan.

Thereupon, the Charging Party herein brought a proceeding before the Ninth Circuit to compel compliance with its decision enforcing the Board's order in the instant case. On May 8, 1987, the Ninth Circuit found merit to the contention of the Charging Party and, inter alia, with the acquiescence of the Board, has required that its Felbro holding be applied to the discriminatees herein. NLRB v. Ashkenazy Property Management, ___ F.2d ___, 125 LRRM 2587 (9th Cir. 1987).

The Respondent excepts to the Ninth Circuit's interpretation of the Sure-Tan decision and sought to introduce evidence during the course of the hearing of the immigration status of each discriminatee. However, as a result of the aforementioned proceeding the Respondent has been precluded from attempting to demonstrate the immigration status of the discriminatees. Nevertheless, it has been permitted to inquire, in order to determine the discriminatees' continued availability for work, whether they have been outside of the United States during any

portion of the backpay period.

A. The Discriminatees Who Appeared at the Hearing

Francisco Flores

Francisco Flores was a houseman for Respondent. The backpay period for Flores extends from January 1, 1981, through the second quarter of 1984 (13 quarters), and is continuing because, according to the General Counsel, the Respondent has not made a valid offer of reinstatement to Flores. Flores sought and obtained work during 12 of the 13 quarters; in 3 of the quarters his interim earnings exceeded backpay; in 3 quarters, his backpay exceeded interim earnings only by about $300 or less; and in 2 quarters his interim earnings were in excess of 50 percent of gross backpay. During the remaining quarters, his interim earnings were nominal.

Flores testified that he looked for work on a regular basis.

Respondent contends that Flores' backpay

period must end as of October 22, 1982, when he was discharged from a supervisor's job. Flores testified that he was fired by FMS Corporation after apparently working there steadily for about 7 months. While Respondent maintains that Flores was discharge for "gross insubordinate behavior," the only evidence of the reason for the discharge is the testimony of Flores to the effect that a new manager was apparently dissatisfied with his job performance. Clearly, this is insufficient to warrant the tolling of backpay. See Mid-American Machinery Co., 258 NLRB 316, 319 (1981).

Flores began working for La Strega, a restaurant, in January 1984. He worked until May 6, 1984, and was replaced by another employee whom, according to Flores, the owner considered to be a better employee. Similarly, contrary to the respondent's contention, this is not a valid reason for tolling backpay.

On November 20, 1986, the Respondent sent the following letter to Flores:

As you may recall, we previously tried

> to contact you by mail regarding reinstatement of your position at L'Ermitage Hotel. Since that time we have been notified of a change in your address and wish to inquire if you would be interested in resuming a position at the L'Ermitage Hotel at this time. If so, please contact us at (213) 854-1111 within 10 working days otherwise we will assume that you are not interested.

Such an inquiry as to whether an employee is interested in employment is not a valid offer of reinstatement and is clearly insufficient to toll backpay. 15th Avenue Iron Works, Inc., 279 NLRB No. 91, slip op. at p. 14 (1986); Flatiron Paving Co., 250 NLRB 554 (1980); Montgomery County MH/MR Emergency Service, 239 NLRB 821, 827 (1978).

At the hearing herein, however, Flores testified that when he received the letter he was working for another employer and believed he was making more money than he could have made in Respondent's employ. Therefore, he did not respond to the letter. This admission, according to Respondent, tolls its backpay liability even if the letter was deficient. Respondent's

contention must be rejected in light of the Board's recent decision in Consolidated Freightways, 290 NLRB No. 85 (July 29, 1988), wherein the Board held that "an employer must first extend a facially valid offer of reinstatement before we examine a discriminatee's reasons for declining the offer."

Accordingly, I find that the total net backpay amount for Flores through the second quarter of 1984 is that designated in the revised backpay specification, namely, $12,503.99.

Maria Guadalupe Biodrawski (nee Lupe Jacobo)

Biodrawski was a floor supervisor for Respondent. She was discharged on January 1, 1981 but did not begin looking for work until the fourth week in January. Biodrawski went to work for another employer during the third quarter of 1981 and worked until the third quarter of 1983 when she was terminated. During this period, her interim earnings exceeded backpay. Biodrawski testified that she was terminated because she was sick for a week or two. There is no record evidence that, as contended by Respondent, she "voluntarily quit a comparable job without excuse

and willfully incurred loss." Therefore, Respondent's contention that Biodrawski's backpay should be tolled as of the date of her termination is without merit.

I find that Biodrawski made the necessary effort to look for work during the remaining quarters and that the one week she spent accompanying her father to Oregon for a business-related matter should not be deducted from backpay, as she was unemployed at the time.

I find that from Biodrawski's total net backpay designated in the revised backpay specification, namely, $9,644.31, should be deducted $451.05 corresponding to 3 weeks' backpay as a result of her failure to look for work during the first 3 weeks of January 1981. Thus, her total net backpay is $9,193.26.

Alberto Cayetano

Cayetano was a houseman for Respondent. He testified that he looked for work throughout the backpay period at times he was not working, except for 6 months during the second and third quarters of 1981 when he was in Mexico. He had interim earnings in all but 1 of the remaining 14

quarters and his interim earnings exceeded backpay in 5 of those quarters. Respondent maintains that his backpay must be tolled as of August 1982 as he was fired on that date for insubordinate behavior. Cayetano's testimony, however, indicates that his discharge apparently stemmed from both an inability to get along with a difficult supervisor and a lack of work. Moreover, upon his discharge he was given a letter of recommendation. I find Respondent's argument to be without merit.

I concluded that Cayetano is entitled to the total net backpay designated in the revised backpay specification, namely, $7,342.55.

Irma Chavez (aka Maria Rodriguez)

Chavez worked under the name of Maria Rodriguez while working for Respondent.[2] She was a maid. Her backpay period extends from January 1, 1981, to August 20, 1985, and from April 1, 1987, to October 31, 1987. She obtained or is credited with interim employment during these 22 quarters, and although her interim earnings never exceeded backpay, the amount of interim earnings in virtually all of the quarters was about 75

percent of the amount she would have received had she remained in Respondent's employ.[3] Respondent maintains that Chavez took herself out of the labor market by accepting jobs with lower pay rather than searching for higher paying jobs. The record does not support Respondent's contention as Chavez worked steadily and it would be mere speculation to conclude that had she obtained higher paying jobs, they would have provided her with sustained employment. She is entitled to the total net backpay contained in the revised backpay specification, namely $10,646.57.

Maria Villalta

Villalta admits that she did not begin looking for work until 3 weeks after her termination.

The Respondent contends that Villalta's backpay period should be tolled in May 1984 when she was allegedly offered reinstatement. Villalta testified that upon receiving a letter from Respondent dated December 6, 1984, stating that "This letter will serve as notification that a housekeeping position is available to you," she

went to the hotel and had a conversation with Respondent's executive housekeeper, Denise Aquilar. Villalta testified that although she then had a full-time job with another employer, she requested full-time employment with Respondent. Aquilar said this was not possible. Villalta then requested at least 2 days' work per week and was told by Aquilar that there were no part-time jobs available.

Aquilar testified that Villalta said she then had a full-time position, and asked for a part-time position of 2 days per week. Aquilar replied that the Respondent did not employ workers on a part-time basis. Aquilar testified that she did not know that Villalta had worked there previously, and when Villalta said she had received a letter from Respondent, Aquilar did not know what she was talking about. Apparently Villalta did not have the letter with her.

I conclude that the Respondent has not sustained its burden of proof. Villalta appeared to be a credible witness. Indeed, she admitted that she did not look for work during the first 3 weeks after he discharge. Further, Aquilar did

not know anything about the letter or, apparently, that Respondent had made a written offer of reinstatement to Villalta, and should have investigated the matter further when she was told about the letter. If there was indeed a failure of communication, the Respondent must be held accountable for the adverse consequences. The record indicates that even though Villalta had full-time employment elsewhere, she would have earned more money in Respondent's employ. Therefore, it is reasonable to presume that she would have preferred a full-time job with Respondent. Further, asking for 2 days' additional work per week is not inconsistent with holding down another full-time job, and thus Villalta's version of the conversation is plausible.

I therefore conclude that, as alleged, Villalta's backpay period is continuing, and that she is owed the amount set forth in the revised backpay specification ($7,009.45) less 3 weeks' backpay for the first quarter of 1981 ($443.05) or $6,566.40.

Sonia Moya

Moya apparently began working for Respondent less than a month prior to her discharge. Although not a statutory supervisor, Moya was a "floor or desk supervisor" for Respondent and was paid $4 per hour, whereas most of the rank-and-file employees were paid $3.25 per hour. Moya testified in English without an interpreter. Her husband worked at a job from 4 p.m. to midnight, apparently throughout the backpay period.

The backpay specification shows that for 4 years (16 quarters--from January 1, 1981, to December 20, 1984), Moya was able to find only limited employment. Moya testified that, on a fairly regular basis, she applied in person for various jobs, looked for others by answering newspaper want ads in person and by telephone, and just drove around and walked into various prospective employers' premises. She further testified that she registered for unemployment and went to the unemployment office about four times in 1981. She had no documentary evidence that she registered with the unemployment office and testified that she threw the registration

card away. She apparently did not collect unemployment. During the first quarter of 1981 she worked for the San Fernando Sheraton Hotel for 3 days and earned $47.15. She stopped looking for a job thereafter because of pregnancy complications. She had a baby on September 5, 1981, and testified that she began seeking work again in mid-October 1981, but was unable to find work. During the first quarter of 1982, she earned $455 ($35 per week) cleaning a private home 1 day a week. During the second quarter of 1982, she earned $840 taking care of two other children in her home. She found no work during the third and fourth quarters of 1982. During the first quarter of 1983, she earned $420 taking care of one child in her home. Thereafter, for the 3 subsequent quarters, she did not work. During the first quarter of 1984, she worked at McDonald's Restaurant on a part-time basis for about a month, and earned $151.13. Thereafter, for the next 3 quarters, she again took care of children in her home, and earned $450, $675, and $650, respectively, in each quarter.

During the course of the backpay

period, the Regional Office sent a series of quarterly compliance forms to Moya. The forms request, inter alia, that the employee list all places of employment. The forms further state as follows:

> If you were without employment at any time during this period, make a complete list on the reverse side of this form of all names of employment agencies, employers, want ads and others where you sought work, giving addresses and dates of contact. Under the law, in order to have any claim for backpay which may be due you, it is your responsibility to continue your search for employment during periods when you are unemployed or only temporarily employed.

The reverse side of the form contains three columns, one for each month of the quarter, wherein the employee is to list the places where he/she sought work. During each of the 6 quarters after her pregnancy complications when Moya was unemployed and was actively seeking

work, she listed from 7 to 9 places where she sought work. She also listed 7 places during the first quarter of 1982 when she was doing cleaning work at a private residence 1 day a week. However, during the 7 quarters when she was working at McDonald's or caring for children at her home, the listings all but stopped. Thus for the first month of the second quarter of 1982 (April), she states: "Make [sic] several phone calls to places where I've applied for jobs"; and for the second and third months (May and June) of the quarter she states, "Taking care of two kids at home-$70/wk." For the first quarter of 1983 when she earned $420 taking care of one child at home, she does not list the names of any places she looked for work. For the first quarter of 1984 when she worked part-time at McDonald's for a month and earned $151, she doe snot list any places she looked for work. Nor does she list any places for the second and third quarters of 1984 when she was caring for children. During the fourth quarter of 1984, however, the record shows that she was caring for children and earned $658, (although the form she submitted does not

reflect this) and she lists 13 places where she sought work.

Moya testified that she was able to look for work while she was caring for children, as she would make phone calls to prospective employers; also, her husband, who worked at night, would sometimes care for the children during the day thus enabling her to look for work.

I conclude from the foregoing that at all times when Moya was taking care of children she considered this to be sufficient interim employment and did not make a diligent search for work. Thus, on the compliance form for the second quarter of 1982 where she was requested to list places where she sought work, she stated, "Taking care of two kids at home." As noted, on other compliance forms when she was taking care of children or when she worked part-time at McDonald's for a month, she did not list any prospective employers. I therefore find that the Respondent has sustained its burden of proof in this regard.

The record shows that, except for child

care jobs for which Moya earned from about $1 to $2 per hour (depending on whether she was taking care of one or two children), and the one housecleaning job at $35 per week for 1 day's work per week, she was able to earn less than $200 in 4 years. According to the revised backpay specification, she is owed $26,311.57. Moya, while in Respondent's employ, was earning more than some 85 percent of the other discriminatees. She was a floor desk supervisor and, unlike some of the employees, was able to speak English well enough to testify without an interpreter. She testified that she had frequent access to a car during the day as her husband worked at night, and looked for jobs as a maid, waitress, cashier, or any other type of job, at various locations throughout the Los Angeles area, including Hollywood, Santa Monica, Beverly Hills, and Glendale. I find that the foregoing facts are sufficient to warrant the finding that Moya's testimony that she made a diligent search for work is unreliable and that the Respondent has sustained its burden of proof. It is simply inconceivable that she was not able, at least

periodically during the backpay period, to find unskilled work in the greater Los Angeles area where there are literally thousands of such jobs. When asked to explain her inability to find work, Moya testified that she was just unlucky. In the absence of a more plausible explanation, I am constrained to conclude that she simply did not make the requisite effort.

Based on the foregoing, I find that Moya is entitled only to $633.85 for the first quarter of 1981 and $1,172.75 for the fourth quarter of 1984. I find that she sought work during this latter quarter because the compliance form, unlike those other forms during period when she was caring for children, listed the names and addresses of some 13 employers, and Moya appeared to have a clear recollection of having personal interviews with two of the prospective employers listed. Thus, she is owed $1,806.60.

Oscar Zetino Alvarenga

Alvarenga worked as a houseman for Respondent since 1979 and was earning $3.35 per hour at the time of his discharge. He testified that upon his discharge he registered at the

unemployment office and was sent to some places to apply for work. He applied for various types of jobs. His compliance form for the first quarter of 1981 lists only one employer, and Alvarenga was unable to recall the names of other places he looked for work. He began working for Hillcrest Motor Company beginning the second quarter of 1981, and he worked there until February 1982, when he was laid off for lack of work. He again registered with the unemployment office and was unable to find work until about March 1983, when he began working for Dollar Rent-A-Car. He was terminated for "insubordination" on August 18, 1983. Regarding this termination Alvarenga testified that his manager was "giving him a hard time" and was making racial remarks against Latinos. He broke his wrist in 1984 and was unable to work for 8 months thereafter.

Alvarenga specifically testified that he does not remember looking for work in 1982 at places that are not listed on the compliance forms he submitted. He listed no prospective employers on the compliance form for the first

quarter of 1982, and listed only the Employment Development Department on the compliance form for the second quarter. For the third and fourth quarters he listed only four prospective employers.

I conclude that the Respondent has shown that Alvarenga did not make sufficient efforts to look for work during 1982 after he was discharged from Hillcrest Motor Company and that he is entitled to no backpay for the four quarters of that year. However, although the compliance forms for the subsequent quarters list only from zero to three prospective employers, Alvarenga testified that he contacted about three employers per week during this time. And while he was able to identify only several of these employers, nevertheless he seemed to recollect the details of some interviews. Therefore, I find that the Respondent has not sustained its burden of proof by showing that Alvarenga's search for work during this period of time was deficient. Further, it is clear that due to his injury he was not available for work beginning in May 1984 and continuing until the end of the

year. As a result, his total backpay amount is $7,985.09.

B. The Remaining Discriminatees

There are nine discriminatees who have not been located. Counsel for the General Counsel requests that the backpay amounts contained in the revised backpay specification for each employee, except for Aladino Hammond (infra), be placed in an escrow account pursuant to the Board's decisions in Starlite Cutting, 280 NLRB No. 120 (1986), and 284 NLRB No. 171 (1987). As to missing discriminatee Hammond, the General Counsel requests that his backpay amount be reduced because the record evidence indicates that he has been out of the country and unavailable for work since "some time" in 1981. Since the record evidence does not clearly show when Hammond left the country in 1981, the General Counsel has arbitrarily assumed that he left on December 31 of that year and that the amount placed in escrow should be computer accordingly. Thus, according to the General Counsel, the amount placed in the escrow account

for Hammond should be $7,733.20.

The Respondent takes the position that since it is unknown when Hammond left the country, it must be presumed that he either left immediately after his discharge on January 1, 1981, or did not search for work because he was preparing to leave the country, and therefore is not entitled to any backpay.

The Respondent contends that the parties "stipulated" that four other discriminatees have permanently settled in a foreign country and are similarly not entitled to backpay. According to the Respondent, Adela Escalante, with a backpay claim of $898.85, has resettled in Cancun, Mexico; Concepcion Molina, with a backpay claim of $1,939.30 has resettled in El Salvador; Ana Ramirez, with a backpay claim of $429.70, has resettled in El Salvador; and Gregoria Salazar, with a backpay claim of $4,692.04, has resettled in Canada. The record shows that the stipulation referred to by Respondent (Tr. page 155) involved a list of discriminatees who were "unavailable or out of the country," and whom the General Counsel has

been unable to contact. Thus, the record does not show whether or when any of the discriminatees, named above, have settled in a foreign country. Apparently, the Respondent has learned the whereabouts of the four named discriminatees from prehearing discussions with other discriminatees but, as noted, the record contains no evidence of this. Thus, based on the record, and unlike the situation with Aladino Hammond, the only conclusion that may be drawn is that these four disciminatees are simply unaccounted for to date. Further, there are four additional individuals to be added to this list of discriminatees whose whereabouts are unknown, namely, Maria Alvarez, with a backpay claim of $1,442.20, Susana Andrade, with a backpay claim of $381.30, Maria Chavez, with a backpay claim of $384.65, and Maria Sandoval, with a backpay claim of $434.55.

As the burden of proof in mitigating backpay liability is placed on Respondent, I agree with the General Counsel's position that the aforementioned amounts of backpay, including the amount for Aladino Hammond, should be placed

in escrow for the named discriminatees under the provisions of Starlite Cutting, supra. The Respondent asserts that this instant case is distinguishable from the Starlite Cutting decision because the Respondent has properly filed and served subpoenas on all of the discriminatees who have not been located, and further, because Starlite Cutting does not provide for a hearing before an administrative law judge if and when the discriminatees are located. Contrary to Respondent's position, no precedent has been cited to me distinguishing between situations where, as in Starlite Cutting, the Respondent did not file an answer to the backpay specification, or where as in the instant case, the Respondent has litigated the matter fully and has attempted to subpoena the discriminatees. Further, Starlite Cutting does not appear to place the ultimate determination as to the amount of backpay with the Regional Director or to preclude a further hearing before an administrative law judge if an issue as to the amount of backpay arises after the discriminatees are located.

SUPPLEMENTAL ORDER[4]

Respondent, its officers, agents, successors, and assigns, shall:

1. Pay to each discriminatee the sum set opposite his or her name appearing below on the attached net backpay recapitulation marked "Appendix," together with interest computed in the manner prescribed in Florida Steel Corporation, 231 NLRB 651 (1977), and New Horizons for the Retarded, 283 NLRB No. 181 (May 28, 1987).

2. Remit the escrow amounts set forth in the "Appendix" to the Regional Director for Region 31, said amounts to be held in escrow for the discriminatees pending further efforts to locate them and accurately determine their backpay.

Dated: September 21, 1988

Gerald A. Wacknow

Administrative Law Judge

Footnotes

[1] Their names and the amounts they have received are contained in General Counsel's Exhibit Nos. 14 and 15.

[2] Respondent's brief indicates that Respondent is no longer contending that Rodriguez never worked for the Company.

[3] The backpay specification credits Chavez with interim earnings she would have received had she continued to work at the Pasadena Hilton and at Crown Zipper, her two interim employers, rather than remain at home for periods of time to take care of children.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

1. NET BACKPAY

Name	Net Backpay
Francisco Flores	$12,503.09
Maria Guadalupe Biodrawski (nee Lupe Jacobo)	9,193.26
Alberto Cayetano	7,342.55
Irma Chavez (aka Maria Rodriguez)	10,646.57
Maria Villalta	6,566.40
Sonia Moya	1,806.60
Oscar Alvarenga	7,985.09

2. ESCROW ACCOUNT

Aladino Hammond	$ 7,733.20
Adela Escalante	898.85
Concepcion Molina	1,939.30
Ana Ramirez	429.70
Gregoria Salazar	4,692.04
Maria Alvarez	1,442.20
Susana Andrade	381.30
Maria Chavez	384.65
Maria Sandoval	434.55

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. ASHKENAZY PROPERTY MANAGEMENT CORPORATION d/b/a L'ERMITAGE HOTEL, *Respondent.*	No. 84-7680 NLRB 31-CA-10775 ORDER

Filed May 8, 1987

Before: William C. Canby, Jr., Stephen Reinhardt and John T. Noonan, Jr., Circuit Judges.

COUNSEL

Kenneth Hipp, Peter Winkler, and Morton Namrow, Washington, D.C., for the petitioner.

Howard M. Knee and Edward B. Robin, Los Angeles, California, for the respondent.

ORDER

The charging party's motion to compel compliance with our decision in this case, issued on July 28, 1986, is denied. The NLRB has agreed that it will comply with that decision in light of our earlier decision in *Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro)*, 795 F.2d 705 (9th

ational Labor Relations Act, 29 U.S.C. § 158 (1982), o be implemented regardless of the worker's immigra- tatus. *Id.*

Board's statement that it is agreeing to comply with in this case only is unacceptable. Administrative agen- e not free to refuse to follow circuit precedent in cases ating within the circuit, unless the Board has a good ntention of seeking review of the particular proceeding Supreme Court. *See Lopez v. Heckler*, 572 F. Supp. 26 Cal. 1983), *aff'd in part, rev'd in part*, 725 F.2d 1489, 9th Cir.) (The "Secretary is deliberately and unequivo- louting the procedures she is required by law to fol- . [T]he Secretary here knows precisely what the courts law is and is nevertheless refusing to apply the law as ned."), *vacated and remanded in light of recent legisla-* 05 S. Ct. 583 (1984); *Elliot v. Weinberger*, 564 F.2d 1226 (9th Cir. 1977) (approving of administrative mus under 28 U.S.C. § 1361 because "[o]nce the court ets the law" the defendant's duty is clear) (citation d), *aff'd on other grounds sub nom, Califano v. ki*, 442 U.S. 682 (1979); *Cardoza Fonseca v. INS*, 767 448, 1453-55 (9th Cir. 1985), *aff'd* 107 S. Ct. 1207 *See also Allegheny General Hospital v. NLRB*, 608 65, 970 (3d Cir. 1979) ("A decision by this court, not ed by the United States Supreme Court, is . . . binding nferior courts and litigants in the [circuit], and also on strative agencies."). However, any future act of "non- ence" should be dealt with by this court in the specific in which it occurs so that we may address the agency's lar violation of the rule of law and fashion a remedy appropriate in light of all the relevant circumstances.

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
RCLAYS / ELECTROGRAPHIC—SAN FRANCISCO—(415) 588-1155

mmary, which does not constitute a part of the opinion of the court, is copyrighted © 1987 by Barclays Law Publishers.

(2)

No. 90-1497

FILED
MAR 29 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION d/b/a L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY d/b/a L'ERMITAGE HOTEL,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES and BARTENDERS UNION, LOCAL 11, AFL-CIO,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

INTERVENOR'S BRIEF IN OPPOSITION

MICHAEL RUBIN
Counsel of Record
DANIEL T. PURTELL
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

ELLEN GREENSTONE
STEVEN HOLGUIN
GREENSTONE, HOLGUIN, GARFIELD & KNOX
3780 Wilshire Blvd., Sixth Floor
Los Angeles, CA 90010
(213) 381-1828
Counsel for Intervenor

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the D.C. Circuit, in its unpublished decision in *Ashkenazy III*, correctly applied the law-of-the-case doctrine in holding that the Ninth Circuit's *Ashkenazy II* order was neither "clearly erroneous" nor "manifestly unjust" insofar as it required the NLRB to provide back-pay to the victims of petitioners' unfair labor practice violations without regard to their immigration status.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
ADDITIONAL STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 7
EEOC v. Tortilleria "La Mejor," —— F. Supp. ——, CV-F-87-505 REC (E.D.Cal., Feb. 20, 1991) 7
Local 512, ILGWU v. NLRB, 795 F.2d 705 (9th Cir. 1986) 3, 5, 6
Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988) 7
Rios v. Enterprise Assoc. of Steamfitters Local 638, 860 F.2d 1168 (2d Cir. 1988) 7
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 5, 6
United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) 9
W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) 9

STATUTES

8 U.S.C. § 1254a 8
8 U.S.C. § 1324a(a)(1) 2
29 U.S.C. § 158(a)(1) 2
Immigration Reform and Control Act
§ 101(a)(3)(A) 2, 8
§ 101(b)(1) 9
§ 121(a)(1) 9
H. Rep. No. 99-682 (I), 99th Cong., 2d Sess. (1986) 10
H. Rep. No. 99-682 (II), 99th Cong., 2d Sess. (1986) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1497

ASHKENAZY PROPERTY MANAGEMENT CORPORATION d/b/a L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY d/b/a L'ERMITAGE HOTEL,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES and BARTENDERS UNION, LOCAL 11, AFL-CIO,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

INTERVENOR'S BRIEF IN OPPOSITION

Intervenor Hotel Employees and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO respectfully asks this Court to deny the Petition for Writ of Certiorari seeking review of the District of Columbia Circuit's opinion in this case.

OPINIONS BELOW

The unpublished *per curiam* opinion of the United States Court of Appeals for the District of Columbia (*Ashkenazy III*) is reprinted at Pet. App. A6-14. The

supplemental decision and order of the National Labor Relations Board is reported at 293 NLRB No. 114 (1990) and reprinted at Pet. App. A15-29. The first decision of the Ninth Circuit in this case is reported at 796 F.2d 479 (1986) (*Ashkenazy I*). The second decision of the Ninth Circuit in this case, which was adopted as the law of the case by the D.C. Circuit, is reported at 817 F.2d 74 (1987) (*Ashkenazy II*) and reprinted at Pet. App. A60-61.

ADDITIONAL STATUTE INVOLVED

Section 101(a)(3)(A) of the Immigration Reform and Control Act of 1986 ("IRCA") provides:

> Section 274A(a)(1) of the Immigration and Nationality Act [8 U.S.C. § 1324a(a)(1)] shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act.

STATEMENT OF THE CASE

More than a decade ago, petitioners Ashkenazy Property Management Corp. *et al.* ("Ashkenazy") discharged the entire housekeeping staff of the L'Ermitage Hotel in Beverly Hills because the staff had engaged in concerted activities to better their working conditions. After intervenor union filed an unfair labor practice charge, the ALJ issued a decision finding that Ashkenazy had violated § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), and recommending the conventional backpay remedy. 268 NLRB 744, 751.[1] The NLRB affirmed the ALJ's decision and recommended order. 268 NLRB at 744 (1984). On a Petition for Enforcement, the Ninth Circuit affirmed the Board's order in its entirety, including the requirement that Ashkenazy provide backpay to its former workers. 796 F.2d 479 (9th Cir. 1986) (*Ashkenazy I*).

---

[1] Reinstatement was also ordered, but that is no longer an issue in the case. *See* Pet. App. A19-21.

The case was returned to the NLRB for compliance proceedings. On December 19, 1986, shortly after the enactment of the Immigration Reform and Control Act of 1986 ("IRCA"), the NLRB's Compliance Officer sent a letter to each discriminatee, requiring them to prove their entitlement to "legalization" under IRCA as a precondition to receiving backpay. Because this letter indicated that the NLRB's General Counsel might "reconsider" the Board's earlier backpay order, intervenor union filed a Motion to Compel Compliance in the Ninth Circuit. The union argued that it was impermissible to require the victims of Ashkenazy's unfair labor practices to prove their "lawful" immigration status as a precondition to obtaining backpay because: 1) no such requirement was contained in *Ashkenazy I* or the Board's remedial order which the Ninth Circuit had enforced; 2) any such requirement would be inconsistent with the Ninth Circuit's decision in *Local 512, ILGWU v. NLRB*, 795 F.2d 705 (9th Cir. 1986) ("*Felbro*"), which held that the NLRB and its compliance officers had neither the statutory authority nor the administrative competence to consider a worker's immigration status as a precondition to eligibility for backpay relief under the NLRA; and 3) nothing in the newly-enacted IRCA or its legislative history had changed this result.

The NLRB responded to the union's motion by acknowledging that *Ashkenazy I* required its compliance proceedings to be conducted in a manner consistent with *Felbro*. The NLRB went on to state, however, that it would acquiesce in the Ninth Circuit's *Felbro* decision only with respect to the instant case.

In light of the Board's agreement to follow *Ashkenazy I* and *Felbro* in this case, the Ninth Circuit denied Intervenor's Motion to Compel Compliance as moot. Pet. App. A60 ("*Ashkenazy II*"). The court stated, however, that the Board's "agree[ment] to comply with *Felbro* in this case only is unacceptable," and it reiterated the govern-

ing principle that "in the case of workers *present* in the United States, remedies afforded for violations of the [NLRA] . . .[are] to be implemented *regardless of the worker's immigration status.*" Pet. App. A60-61 (emphasis added).

On remand, Ashkenazy continued to oppose the issuance of a backpay award, on the ground that some of the discriminatees may have been undocumented aliens. In September 1988, an ALJ again rejected this argument, holding that since the Ninth Circuit "had required that its *Felbro* holding be applied to the discriminatees herein," Ashkenazy was "precluded from attempting to demonstrate the immigration status of the discriminatees." Pet. App. A34. The ALJ's Recommended Order included a backpay award of approximately $75,000. Pet. App. A57, A59.

Ashkenazy appealed this backpay award to the NLRB, which again affirmed the ALJ's ruling (with certain modifications in the amounts of pay owing). Pet. App. A22. Rather than challenging this decision for a second time in the Ninth Circuit, whose views on the issue were well-settled, Ashkenazy instead filed a Petition for Review in the D.C. Circuit, making the identical arguments that it had unsuccessfully urged in its previous appeal.

The D.C. Circuit affirmed the NLRB's backpay award under a law-of-the-case analysis, finding application of that doctrine to be "particularly appropriate where a party brings a previously decided issue before a second forum, in an attempt to 'forum shop' for a second opinion." Pet. App. A10. The court concluded:

> Here, the Ninth Circuit previously decided that the Board was required to conduct its back pay hearings in a manner consistent with the Ninth Circuit's *Felbro* decision. Indeed, the Ninth Circuit specifically stated that "in the case of workers present in the United States, remedies afforded for violations of the National Labor Relations Act, 29

> U.S.C. Section 158 (1982), [are] to be implemented regardless of the worker's immigration status." . . .
>
> Under the law of the case, this court should respect this prior ruling unless it is clearly erroneous or will work a substantial injustice. . . . Here, Ashkenazy argues that the Ninth Circuit's decision to apply *Felbro* in this case is clearly erroneous when examined under the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). . . .
>
> Although this Court need not adopt a similar interpretation of *Sure-Tan*, we find that the rationale provided by the Ninth Circuit is not clearly erroneous, nor does it work a substantial injustice. For these reasons, the law of the case applies, and the Board was correct in holding its hearing to comply with the law of the Ninth Circuit.

Pet. App. A11-12.[2]

REASONS FOR DENYING THE WRIT

Ashkenazy urges this Court to grant certiorari to determine whether the Ninth Circuit's decision five years ago in *Local 512, HGWU v. NLRB*, 795 F.2d 705 (1986) ("*Felbro*"), is inconsistent with this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). There are numerous reasons why the Court should not grant certiorari.

1. The present case arises in the context of a law-of-the-case analysis. The appropriate inquiry is therefore not whether the underlying Ninth Circuit decision in *Felbro* was legally correct, but whether that decision (and the Ninth Circuit's reliance on *Felbro* in *Ashkenazy II*) were "clearly erroneous" or "manifestly unjust." See Pet. App. A11. This case therefore does not present an

[2] The D.C. Circuit also held that the Board's backpay awards were supported by substantial evidence (Pet. App. A12-13) and that the Board did not err by ordering the backpay for nine unavailable discriminatees to be placed in escrow (Pet. App. A13-14). Ashkenazy does not challenge those holdings.

appropriate vehicle for considering the legal issue that is at the root of Ashkenazy's Petition.

2. In any event, the Ninth Circuit's analysis in *Felbro* was correct. In deciding *Felbro*, the Ninth Circuit analyzed this Court's *Sure-Tan* decision in depth, and properly concluded that nothing in *Sure-Tan* precluded the award of backpay to "an undocumented worker who remains in the United States, and who has not been the subject of any INS deportation proceedings." 795 F.2d at 717.

At issue in *Sure-Tan* was the propriety of a six-month "speculative" backpay award to unfair labor practice discriminatees who had been apprehended by the INS and *who had left the country immediately after their employer had committed its unfair labor practice.* The Court rejected the lower court's award of backpay as an improper attempt to "estimate" on a barren factual record what an appropriate backpay award might be "without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS. . . ." 467 U.S. at 901. The Court noted, however, that if the record had contained "evidence . . . as to the period of time these particular employees might have continued working before apprehension by the INS," a backpay award for that period of time would have been appropriate (*id.* at 901 n.11)—thus indicating that if the discriminatees had stayed in this country rather than returning immediately to Mexico upon apprehension by the INS, they would have been entitled to backpay.[3]

---

[3] While Ashkenazy points to the Court's statement that "in computing backpay, the employees must be deemed 'unavailable' for work . . . during any period when they were not lawfully entitled to be present and employed in the United States" (467 U.S. at 903), the Court's reference to "the" employees was presumably to the *Sure-Tan* discriminatees who were absent from the United States as a result of having accepted voluntary deportation on the same day their employer committed its unfair labor practice.

3. The Ninth Circuit's reading of *Sure-Tan* has been embraced by every court of appeal to consider it. For example, the Second Circuit in the Title VII case of *Rios v. Enterprise Assoc. of Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988), held:

> We conclude, in agreement with the Ninth Circuit, that undocumented workers who remained in this country are eligible for backpay as of the time of a violation. *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987) (NLRA case) [*Ashkenazy II*]; *Local 512, Warehouse & Office Workers' Union v. NLRB* [*Felbro*], 795 F.2d 705 (9th Cir. 1986) (NLRA case). We find such awards to be consistent with *Sure-Tan*'s holding that the protections of the NLRA—and by analogy, Title VII—must apply to undocumented workers, at least to the extent that those protections do not conflict with immigration laws.

860 F.2d at 1173. Similarly, the Eleventh Circuit in the Fair Labor Standards Act case of *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989), agreed that *Sure-Tan* does *not* preclude undocumented aliens from recovering backpay or liquidated damages under the Fair Labor Standards Act, as long as they were present in the country during their backpay periods. To our knowledge, no other court has concluded differently.[4]

4. Ashkenazy further contends that even if *Felbro* were correctly decided at the time, it should no longer be controlling because of the intervening impact of IRCA, which subjects employers to statutory sanctions if they hire undocumented aliens after the November 6, 1986 effective date of the Act. According to Ashkenazy,

---

[4] Moreover, the Ninth Circuit expressly reaffirmed its *Felbro* analysis in *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989); *see also EEOC v. Tortilleria "La Mejor,"* —— F.Supp. ——, No. CV-F-87-505 REC (E.D.Cal., Feb. 20, 1991) (undocumented alien entitled to seek backpay award under Title VII).

IRCA removes the "linchpin of the Ninth Circuit's analysis by making an award of back pay . . . a violation of the immigration laws." See Pet. at 18-19. There are at least four flaws in this argument.

First, as the NLRB pointed out in its argument to the D.C. Circuit, IRCA's employer sanctions provisions are irrelevant in this case, because Ashkenazy hired all of the L'Ermitage Hotel discriminatees in this case well *before* IRCA went into effect. For that reason, those discriminatees all qualify as "grandfathered employees" under § 101(a)(3)(A) of IRCA, which creates an exemption from the employer sanctions provision for workers "hir[ed] . . . before the date of the enactment of this Act." [5]

Second, even if the discriminatees in this case were *not* grandfathered, there would still be no conflict between Ashkenazy's backpay obligations under the NLRA and its immigration obligations under IRCA. Satisfaction of a backpay award by an employer does *not* trigger sanctions under IRCA. Rather, employer sanctions under IRCA are imposed only for the knowing employment of non-grandfathered undocumented workers after November 6, 1986. While IRCA gives employers a legitimate, non-discriminatory statutory justification for refusing to hire undocumented workers after that date, it does *not* permit employers to treat such workers in a discriminatory manner proscribed by other statutes. An employer who unlawfully hires and unlawfully discriminates against an undocumented worker may be twice penalized —under the NLRA for engaging in proscribed discrimination, and under IRCA for knowingly employing an

[5] *See* Pet. App. A23. Moreover, since the underlying unfair labor practice occurred in January 1981, the likelihood is that the discriminatees were also eligible for legalization under § 245A of IRCA, 8 U.S.C. § 1254a, which provides legalization to aliens who were continuously present in this country in undocumented status as of January 1, 1982.

undocumented worker. It would be counter to the congressional policies underlying those statutes to permit employers to "set off" one statutory remedy against another. *Cf. W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770 (1983).

Third, nothing in the language of IRCA reveals any intent to alter the NLRB's longstanding policy of providing a traditional backpay remedy to discrimatees regardless of their immigration status. Because Congress is presumed to know the effect of its legislative actions and to speak clearly when it wishes to amend a previously-enacted statute, "it is . . . a cardinal rule of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). Although Congress in IRCA amended a number of other federal statutes, generally for the purpose of limiting the rights of undocumented aliens under their provisions, Congress did not amend the remedial provisions of the NLRA, or any other federal labor law, that had been construed to provide backpay to injured workers regardless of their immigration status.[6]

Finally, IRCA's legislative history expressly stated Congress's intent that federal labor and employment law protections should continue to be available in order to strengthen the deterrent effects of the new employer sanctions provisions. The House Judiciary Committee Report accompanying IRCA thus stated:

---

[6] *See* IRCA § 101(b)(1) (amending the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470); IRCA § 121(a)(1) (amending § 1137 of the Social Security Act, 42 U.S.C. § 1320b-7); IRCA § 121(a)(2) (amending § 214 of the Housing and Community Development Act of 1980, 42 U.S.C. § 1436a); IRCA § 121(a)(3) (amending § 484 of the Higher Education Act of 1965, 20 U.S.C. § 1091); IRCA § 121(a)(5) (amending § 16 of the Food Stamp Act of 1977, 7 U.S.C. § 2025); IRCA § 121(a)(6) (amending the United States Housing Act, 42 U.S.C. § 1437 *et seq.*).

> *It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal . . . labor relations boards . . . to remedy unfair practices* committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.

H. Rep. No. 99-682 (I), 99th Cong. 2d Sess. 58 (emphasis added). The House Education and Labor Committee Report on IRCA similarly stated:

> In addition, *the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as . . . the National Labor Relations Board, . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies.* To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H. Rep. No. 99-682 (II), 99th Cong., 2d Sess. 8-9 (emphasis added). Thus, contrary to Ashkenazy's assertion, nothing in IRCA or its legislative history suggests that Congress intended to limit the backpay rights of undocumented aliens under the NLRA.

CONCLUSION

For the reasons stated, Intervenor hereby requests that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

MICHAEL RUBIN
Counsel of Record
DANIEL T. PURTELL
ALTSHULER, BERZON, NUSSBAUM, BERZON & RUBIN
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151

ELLEN GREENSTONE
STEVEN HOLGUIN
GREENSTONE, HOLGUIN, GARFIELD & KNOX
3780 Wilshire Blvd., Sixth Floor
Los Angeles, CA 90010
(213) 381-1828
Counsel for Intervenor

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

No. 90-1497

In the Supreme Court of the United States

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, d/b/a L'ERMITAGE HOTEL, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board
Washington, D.C. 20570

16p

QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly applied the law of the case when it followed a Ninth Circuit decision, issued at an earlier stage of the proceeding, that prohibited the National Labor Relations Board from conditioning awards of backpay on showings that the victims of an unfair labor practice were legally entitled to be present in the United States during the backpay period.

2. Whether an individual is required to prove that he was legally entitled to be present in the United States in order to receive an award of backpay.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bevles Co. v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), cert. denied, 484 U.S. 985 (1987)	8
Caamano Bros., 275 N.L.R.B. 205 (1985)	8
Christianson v. *Colt Indus. Operating Group*, 486 U.S. 800 (1988)	6
Del Ray Tortilleria, Inc., 302 N.L.R.B. No. 45 (Mar. 27, 1991)	9
EEOC v. *Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989)	8, 10
Felbro, Inc., 274 N.L.R.B. 1268 (1985), rev'd, 795 F.2d 705 (9th Cir. 1986)	8
INS v. *Lopez-Mendoza*, 463 U.S. 1032 (1984)	7
Local 512, Warehouse & Office Workers' Union v. *NLRB*, 795 F.2d 705 (9th Cir. 1986)	3, 8
Patel v. *Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989)	8
Rios v. *Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988)	8, 10
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984)	3, 7
United Steelworkers v. *NLRB*, 377 F.2d 140 (D.C. Cir. 1966)	6

Statutes and regulations:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	8

Statutes and regulations—Continued: Page

Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.* 7
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, Tit. I, 100 Stat. 3359 (8 U.S.C. 1324a *et seq.*) 4
§ 101(a)(3)(B), 8 U.S.C. 1324a note (100 Stat. 3372) 10
§ 274A, 8 U.S.C. 1324a(a) 10
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2
§ 10(f), 29 U.S.C. 160(f) 4
8 C.F.R. 274a.2 9
29 C.F.R. 102.52 *et seq.* 3

Miscellaneous:

Department of Labor, Public Memorandum, GC 88-9 (Oct. 27, 1987) 8-9

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1497

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, d/b/a L'ERMITAGE HOTEL, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6-14) is not reported, but is noted at 917 F.2d 62 (Table). The supplemental decision and order of the National Labor Relations Board (Pet. App. 15-59) are reported at 293 N.L.R.B. No. 114. An opinion of the United States Court of Appeals for the Ninth Circuit issued at an earlier stage of the proceedings (Pet. App. 60-61) is reported at 817 F.2d 74. The Board's decision and order in the underlying unfair labor practice proceeding are reported at 268 N.L.R.B. 744. The Ninth Circuit's memorandum opinion enforcing that order is not reported, but is noted at 796 F.2d 479 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 6-7) was entered on October 30, 1990. On January 22, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 28, 1991. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Labor Relations Board awarded backpay to 16 employees who were discharged because of protected union activities. Their employer argued that the backpay award should be reversed because it was not allowed, during the backpay hearing, to inquire into whether any of the employees were aliens who were not legally entitled to remain in the United States. The D.C. Circuit held that a prior Ninth Circuit decision in this case was the law of the case on that question, and it affirmed the backpay award.

1. In the underlying unfair labor practice proceeding, the Board found that petitioner Ashkenazy Property Management Corp. violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging the employees in its housekeeping department because of the employees' concerted activities.[1] The Board ordered petitioners, among other things, to offer the employees reinstatement and to make them whole for any loss of wages and benefits resulting from their unlawful discharge.

---

[1] In subsequent proceedings, Ashkenazy Property Management Corp. and the other petitioners conceded that they were "joint employers" responsible for any backpay award. See Pet. 4 n.1.

Ashkenazy Property Management Corp., 268 N.L.R.B. 744 (1984), enforced mem., 796 F.2d 479 (9th Cir. 1986) (Table).

2. The Board's regional director then instituted a proceeding to fix the amount of the backpay to be awarded to the employees. See 29 C.F.R. 102.52 *et seq.* In preparing the backpay specification, the regional director instructed each employee to furnish proof that he or she was legally entitled to be present in this country. The charging party in the unfair labor practice proceeding, Hotel Employees and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO, objected to that requirement. It filed a motion with the Ninth Circuit seeking to compel the Board to conduct the backpay proceeding in accordance with *Local 512, Warehouse & Office Workers' Union* v. *NLRB*, 795 F.2d 705 (9th Cir. 1986) (*Felbro*). Pet. App. 8.

In *Felbro*, 795 F.2d at 715-723, the Ninth Circuit had held that aliens who were actually present in the United States during the backpay period were entitled to relief regardless of whether they were legally entitled to remain in this country. The court distinguished this Court's decision in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), on the ground that *Sure-Tan* involved workers who had been voluntarily deported and were thus not present in the United States during the backpay period. *Felbro*, 795 F.2d at 717.

In response to the union's motion, the Board's General Counsel advised the Ninth Circuit that further proceedings in this case would be conducted in a manner consistent with *Felbro*. Petitioners did not appear in the Ninth Circuit to object to that course. The Ninth Circuit denied the union's motion in reliance on the General Counsel's representation. Pet. App. 60-61. The court left no doubt, however, that it considered the Board to be bound by *Felbro*. The Ninth Circuit criticized the General Counsel for acquiescencing in *Felbro* only for purposes of this case, and it indicated

that it was prepared to fashion a remedy for any future "violation of the rule of law." *Id.* at 61.

3. a. In accordance with the General Counsel's representation to the Ninth Circuit, the ALJ conducting the backpay hearing refused to allow petitioners to explore the employees' immigration status. However, petitioners were "permitted to inquire, in order to determine the discriminatees' continued availability for work, whether they ha[d] been outside of the United States during any portion of the backpay period." Pet. App. 34-35.

b. On review of the ALJ's decision, the Board rejected petitioners' contention that the ALJ should have permitted inquiry into the employees' immigration status. Pet. App. 22-23 n.1. The Board explained that the General Counsel "was required [by *Ashkenazy II*] to proceed on a backpay specification consistent with [*Felbro*] with respect to backpay entitlement of employees who are undocumented aliens." *Id.* at 22 n.1. The Board also noted that the employees in question had all been hired prior to the effective date of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324a *et seq.*, and were thus unaffected by that Act's prohibition on the employment of illegal aliens. Pet. App. 23 n.1.

The Board ordered petitioners to pay seven named employees a total of $58,359.64 in backpay plus interest. In addition, petitioners were ordered to pay a total of $18,335.79 into escrow for the benefit of nine employees who were unavailable at the time of the hearing. Pet. App. 20-21.

c. Petitioners sought review of the Board's order in the D.C. Circuit.[2] In an unpublished decision, the D.C.

[2] The NLRA authorizes an employer aggrieved by an order of the Board to seek review in the circuit where the unfair labor practice occurred, the circuit in which the employer resides or transacts business, or the D.C. Circuit. 29 U.S.C. 160(f).

Circuit found that the Ninth Circuit's decision in *Ashkenazy II* was the law of the case with respect to whether backpay should be limited to employees legally entitled to be present in this country. Pet. App. 9-12. Under the law of the case rule, the court explained, "a legal decision made at a prior stage of litigation, unchallenged by subsequent appeal, is binding on subsequent stages of the litigation." *Id.* at 9-10. Application of the doctrine is particularly appropriate, the court added, where, as in this case, "a party brings a previously decided issue before a second forum, in an attempt to 'forum shop' for a second opinion." *Id.* at 10.

The D.C. Circuit added that the law of the case rule would not obligate it to honor the Ninth Circuit's decision in *Ashkenazy II* if the Ninth Circuit's decision were "clearly erroneous" or would "work a substantial injustice." Pet. App. 11. But the D.C. Circuit found that the Ninth Circuit's decision was not clearly inconsistent with this Court's decision in *Sure-Tan* and that the application of *Felbro* to this case would not work a substantial injustice. Accordingly, the court upheld the backpay award. Pet. App. 12.

ARGUMENT

Petitioners argue that the D.C. Circuit misapplied the law of the case rule, and they seek further review of whether *Sure-Tan* limits backpay awards to those employees who can demonstrate that they are legally entitled to remain in the United States during the backpay period. In our view, the D.C. Circuit did not err in its application of the law of the case rule, and the underlying issue does not warrant review by this Court.

1. There is no merit to petitioners' contention (Pet. 22-24) that, because the Ninth Circuit's decision in *Ashkenazy II* denied the union's motion to compel compliance with *Felbro*, that decision is not the law of the case.

As the Ninth Circuit's opinion made clear, the court denied the motion only because the General Counsel agreed to be bound by *Felbro* in this case. Pet. App. 60-61. The court left no doubt that it was prepared to compel compliance in the absence of that commitment. Indeed, the court expressed dissatisfaction with the limited scope of the General Counsel's acquiescence in *Felbro* and declared itself ready to fashion a remedy for any future "violation of the rule of law." *Id.* at 61. There was no doubt that the Board was required to apply *Felbro* to this case. The Board and the D.C. Circuit were fully justified, therefore, in treating this decision as an authoritative ruling on the question presented.

The fact that the General Counsel altered his prior position when he agreed to abide by *Felbro* does not undercut the applicability of the law of the case rule. It was not unreasonable for the General Counsel to agree to honor the established law of the Ninth Circuit, rather than attempt to persuade that circuit to change its view and, failing that, to seek review in this Court. See *United Steelworkers* v. *NLRB*, 377 F.2d 140, 141 (D.C. Cir. 1966) ("certainly [this court] cannot hold the Board to have been in error when it decided to follow a decision of a Court of Appeals, especially of the circuit in which the relevant affairs occurred"). In any event, whether the D.C. Circuit correctly applied the law of the case rule to the unusual facts of this case is not an issue warranting review by this Court.

2. A court of appeals' adherence to the law of the case rule does not insulate the underlying issue from this Court's review. *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817-818 (1988). The correctness of the backpay award entered against petitioners, however, does not present a question warranting this Court's attention.

In *Sure-Tan*, the Board determined that the employer had committed an unfair labor practice when, after its employees had elected a union to act as their bargaining representative,

it sent a letter asking the INS to investigate the employees' immigration status. Nevertheless, the employer's request triggered an investigation, and five of the employees voluntarily left the country to avoid deportation. This Court held that, although they were undocumented aliens, those five individuals were "employees" within the meaning of the statute, and it sustained the Board's unfair labor practice determination. In addressing the remedies available to the five employees, however, the Court held that "the implementation of the Board's traditional remedies * * * must be conditioned upon the employees' legal readmittance to the United States." 467 U.S. at 902-903. "By conditioning * * * offers of reinstatement on the employees' legal reentry," the Court explained, the Board would avoid a conflict with the objective of the Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.*, which is to "deter unauthorized entry." Similarly, the Court stated that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present in the United States." 467 U.S. at 903.

The courts of appeals have uniformly read *Sure-Tan* to permit awards of backpay to undocumented aliens who, unlike the employees in *Sure-Tan*, remain in this country during the backpay period.[3] In *Felbro*, the Ninth Circuit explained that the rationale of *Sure-Tan* does not extend

---

[3] The Court's opinion in *Sure-Tan* provides support for that view. For instance, when the Court reversed the Seventh Circuit's award of six months' backpay to the absent employees because the award was not based on evidence of any actual loss, the Court indicated that a different result might have been justified by "evidence * * * as to the period of time these particular employees might have continued working before apprehension by the INS." 467 U.S. 902 n.11. Cf. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1047-1048 n.4 (1984).

to undocumented aliens continuously present in this country; that undocumented aliens have been eligible for comparable relief under a variety of labor statutes; that denying the Board's traditional reinstatement and backpay remedies to undocumented employees would reduce employers' incentive to comply with the NLRA; that those remedies would not encourage unlawful entry into the United States; and that the Board was not well equipped to resolve complicated issues arising from the immigration laws. 795 F.2d at 719-720.

Other courts of appeals have reached the same conclusion regarding other statutes. See *Rios* v. *Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (in actions under Title VII, "undocumented workers who have remained in the country are eligible for backpay as of the time of a violation"); *Patel* v. *Quality Inn South*, 846 F.2d 700, 705 & n.6 (11th Cir. 1988) (undocumented workers are not precluded from receiving backpay awards under the Fair Labor Standards Act of 1938 for periods they were present in the country), cert. denied, 489 U.S. 1011 (1989). See also *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1516-1517 (9th Cir. 1989); *Bevles Co.* v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), cert. denied, 484 U.S. 985 (1987). We are aware of no decision that reached a different conclusion.

In the immediate aftermath of *Sure-Tan*, the Board insisted upon a showing that undocumented aliens were lawfully present in the United States as a condition to an award of backpay. *Felbro, Inc.*, 274 N.L.R.B. 1268 (1985), rev'd in relevant part, 795 F.2d 705 (9th Cir. 1986); *Caamano Bros.*, 275 N.L.R.B. 205, 205 n.1 (1985). The regional director followed that approach when he began to prepare the backpay specification in this case. In 1988, however, the General Counsel outlined a modified approach to backpay awards to undocumented aliens. In her Memo-

randum No. GC 88-9 (Oct. 27, 1987), the General Counsel concluded that, with respect to aliens employed before November 6, 1986, the effective date of the IRCA, the employer should bear the burden of proving that backpay claimants were not lawfully entitled to be present in the United States. Furthermore, this burden may be met only through a proffer of a final INS determination to that effect.[4] The Board recently approved the approach outlined in the General Counsel's memorandum. *Del Ray Tortilleria, Inc.*, 302 N.L.R.B. No. 45 (Mar. 27, 1991), slip op. 7-13 ("Respondent, as the party challenging the employees' entitlement to reinstatement and backpay, should bear the burden of proving their ineligibility by producing evidence that they are subject to an INS deportation order.").

All of the employees whose backpay is at issue in this case were employed prior to the effective date of the Immigration Reform and Control Act. See Pet. App. 22-23 n.1. Petitioners have not suggested that the INS has determined that any of the employees were subject to deportation during the backpay period. Consequently, under the standards presently being applied by the Board and all of the courts of appeals that have considered the issue, petitioners' allegation that some of the employees may not have been lawfully present in this country during the backpay period is not a defense to the award of backpay.[5] There is no

---

[4] With respect to employees hired after November 6, 1986, the General Counsel's memorandum would dictate the same approach, with one addition. Employees who failed to submit a valid "Form I-9" (see 8 C.F.R. 274a.2) verifying their eligibility for employment would not be entitled to reinstatement, and backpay would be withheld for the period that they were unwilling or unable to complete the form. The Board has not considered the remedies available to this category of employees.

[5] That result is not contrary to this Court's holding in *Sure-Tan*. As the administrative law judge noted, petitioners were "permitted to

conflict among the courts of appeals on this issue and no other ground warranting review by this Court.

3. Contrary to petitioner's contention (Pet. 18), the Immigration Reform and Control Act is inapplicable to this case. The IRCA makes it unlawful for an employer to knowingly hire or continue to employ "unauthorized aliens," and it imposes an obligation on employers, enforceable by means of criminal and civil penalties, to verify a prospective employee's right to work in this country. 8 U.S.C. 1324a(a). The IRCA's prohibitions on the employment of unauthorized aliens do not apply, however, to the "continuing employment of an alien who was hired before" November 6, 1986. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, Title I, § 101(a)(3)(B), 100 Stat. 3372. As the Board noted, the employees at issue here were hired prior to that date. Pet. App. 22-23 n.1. The IRCA thus imposes no restriction on the remedies available in this case. Cf. *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 860 F.2d at 1172-1173 & n.2; *EEOC* v. *Hacienda Hotel*, 881 F.2d at 1517 n.11. The inapplicability of the IRCA is a factor counseling against review by this Court, since cases involving employees hired before the effective date of the Act will become increasingly uncommon.

---

inquire, in order to determine the discriminatees' continued availability for work, whether they [had] been outside of the United States during any portion of the backpay period." Pet. App. 34-35. The one employee who testified that he was outside the United States for some part of the backpay period, Alberto Cayetano, was not awarded backpay for that time. *Id.* at 39-40. Thus, no employee was awarded backpay for a period that he was outside the country.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board

MAY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20057